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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/621,279	07/16/2003	John Michael Hughes	F6173(V)	3024

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EXAMINER	
THAKUR, VIREN A	
ART UNIT	**PAPER NUMBER**
1761	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/09/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/621,279	HUGHES, JOHN MICHAEL	
	Examiner	Art Unit	
	Viren Thakur	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *22 November 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-3,5,7-10,13,14 and 16-19* is/are pending in the application.

4a) Of the above claim(s) *16-19* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-3,5,7-10,13 and 14* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of claims 1-15 in the reply filed on November 22, 2006 is acknowledged. The traversal is on the ground(s) that the respective claims are classified in the same classes and thus only a single search would be appropriate. This is not found persuasive because a search in the same class is not grounds for searching together the claims drawn to a method and a product. For instance, the insulated pouch does not require heating of the pouch, let alone heating using a microwave. Thus, the search for a method of consuming the food diverges from the search for the structure of the insulated pouch.

Since in the art, the method for consuming a food product would require a different search than the claims drawn to the insulated pouch and for the reasons cited in the prior Office Action, the requirement is still deemed proper and is therefore made FINAL.

Response to Amendment

2. As a result of the amendment to claim 1, the rejection of claims 1-3, 5-11 and 13 under 35 U.S.C. 102(b) as being anticipated by Smart et al. (US 4890439) has been withdrawn.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

4. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

5. Claims 1-13 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smart et al. (US 4890439) in view of Galomb (US 6245367). Smart et al. teach as cited in the prior Office Action, mailed August 24, 2006.

Smart et al. are silent in teaching wherein the sealed flexible bag further comprises an oxygen barrier comprising polyvinylidene chloride (PVDC), ethylene vinyl alcohol (EVOH) or both. Smart et al. are further silent in teaching wherein the insulating layer further comprises an attaching means for attaching an eating utensil.

Galomb teaches a flexible package that further functions as the container from which to eat the food product (Column 1, Lines 2-6). As one of the objects of the invention, Galomb discloses wherein the flexible package can contain both dry or liquid edible products (Column 2, Lines 64-67). This is further supported on Column 3, Lines 46-50, wherein the package of Galomb can contain additional components such as sugar and powdered milk/cream. Additionally, Galomb teaches including a utensil with the food package for eating the food disposed therein (Column 3, Lines 5-8). In making the flexible package, Galomb discloses wherein the flexible material must be impervious to liquid and air (Column 4, Lines 22-27).

Smart et al. additionally recognize that the package should be able to maintain the freshness of the product disposed therein from the point of sealing at the factory to the point of consumption by the consumer (Column 4, Lines 39-48). Therefore, the invention of both Galomb and Smart et al. are analogous in teaching a package containing a food, wherein the package must be fresh and in a sanitary condition upon purchase and consumption by the consumer, and wherein the food can be consumed directly from the package. Thus using a flexible web material such as polyvinylidene chloride or ethylene vinyl alcohol to make the flexible package would have been obvious to one having ordinary skill in the art. Such a modification would provide enhanced freshness for products and could further broaden the applicability of the invention of Smart et al. to a greater variety of food product. Nevertheless, both PVDC and EVOH are well

known to have oxygen barrier properties as well as moisture barrier properties, as further evidenced by Garvey et al. (US 5241150) on Column 3, Lines 47-60. Thus, in light of the teachings of Galomb, Smart et al. and the knowledge of one having ordinary skill in the art using PVDC or EVOH to make the flexible bag would not have provided an inventive step over the prior art.

By incorporating a utensil into a flexible food package, which is analogous to the flexible food package of Smart et al., one having ordinary skill would have recognized that the food package would be more readily portable since a utensil to eat the food is included therein. Therefore, it would have been obvious to modify Smart et al. include the utensil for eating the food product therein, as taught by Galomb, for the purpose of portability. Additionally, such a modification would relieve the consumer from having to find a utensil to consume the food product. Thus the consumer would be able to consume said food wherever he desires as opposed to a location where he knows he will be able to obtain a utensil for consuming the food. Therefore, such a modification would not have provided an inventive step over the prior art teachings in combination with the knowledge of one having ordinary skill in the art.

Regarding the insulating layer and the height of the insulating layer, Smart et al. disclose the insulating layer wrapping around the entirety of the bag; thus the entire portion of the sides of the bag are covered with the insulating layer. As can be seen in Figure 3, the flexible bag of Smart et al. has a base suitable to enable the insulated pouch to stand. The invention of Smart et al. discloses fried

potatoes and pizza as types of food that could be disposed within the food package (Column 6, Lines 55-62). It is obvious to one having ordinary skill in the art that a package of fried potatoes or a pizza would have a height of at least 0.5 cm to about 3 cm. This also teaches that the type of food and the amount of food disposed within the bag of Smart et al. would determine the height of the bag. Nevertheless, this knowledge in combination with the fact that the insulating layer (Figure 3, Item 12) wraps around the entire package the portion of the insulating layer above the food product teaches that the insulating layer would be at least 0.5 cm to 3 cm above the bottom of the flexible bag. Therefore the height of the insulating layer above the base of the bag would not have provided an inventive step over the prior art.

6. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Smart et al. (US 4890439) and Galomb (US 6245367) as applied to claims 1-12 and 15 above, and further in view of Lawless (US 5395632). Smart et al. in view of Galomb teach as discussed above. Smart et al. further teach wherein the food package should be displayed in the store in a presentable fashion (Column 4, Lines 63-66), additionally, through the use of a visually appealing package (Column 5, Lines 33-41; Column 11, Lines 3-8).

Smart et al. in view of Galomb is silent in teaching wherein the top section comprises an orifice to hang the insulated pouch.

Lawless et al. teach a flexible food package that further comprises an orifice (Figure 6, Item 38) for the purpose of displaying said product by suspending the package (Column 5, Lines 49-60). Lawless et al. further teach that suspension of the package for display will prevent damage to the food product stored within (Column 5, Lines 49-60). Nevertheless, both Smart et al. and Lawless et al. teach the need for displaying an attractive package so as to provide a presentable food package to the consumer (Smart et al.: Column 4, Lines 39-48, 63-66, Column 5, Lines 33-41, Column 11, Lines 3-8; Lawless et al.: Column 3, Lines 18-21).

Given these teachings, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Smart et al. to include an opening for displaying the packaged food, as taught by Lawless et al., for the purpose of providing a hanging display to attract customers to the packaged food product. One having ordinary skill in the art would have found it obvious that As opposed to stacking flexible bags one on top of one another, hanging would prevent damage to the food product disposed therein. When stacked one on top of another, the food packages on the bottom of the stack would compress and could lose their air tight seal and thus result in spoilage of the food product. Preventing this damage is one important component to displaying the invention of Smart et al. in a presentable fashion. Therefore, adding an orifice to hang the insulated pouch would not have provided an inventive step over the prior art.

Response to Arguments

7. Applicant's arguments filed November 11, 2006 have been fully considered but they are not persuasive. Applicant argues that none of the cited art describes an insulated pouch having heated product therein whereby the food product may be consumed directly out of the insulated pouch without the need for conventional dishware and while being held in the consumer's hand after heating. The Examiner respectfully asserts that, for the reasons discussed above, Smart et al. teach an insulated flexible package which is heated in a microwave and from which the food can be directly eaten. Galomb provides motivation and teaching to one having ordinary skill in the art to meet the additional claim limitations, as discussed above. Since the package of Smart et al. is insulated it would have been obvious that said package *can be* heated and held by a consumer after heating. Depending on the size of the consumer and the size of the food package, any food package could be held by the consumer in some way and the food eaten directly therefrom. Regarding the height of the insulating layer with respect to the bottom of the flexible bag, please see the rejections above.

Conclusion

8. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Lingle (Prepared Foods, August 1989) discloses packaged meals, ready to eat that have extended shelf-life and are meant to be cooked and eaten directly from the package therein. APack Ready Meals discloses the meals, ready to eat, that are discussed by Lingle that contain all the elements for a full meal, such as an entrée, side dishes, utensils and condiments. US 3460740 A discloses a heat insulating and cushioned pouch. US 3679093 A, US 5090572 A, US 5676244 A, US 5695084 A, discloses a container for food and a utensil attached therein for consuming said food. US 3873735 A discloses a package for heating and venting food comprising an orifice for hanging. US 4138014 A discloses a package for preparing a beverage or food comprising the food contained therein and a utensil enclosed within the same package. US 5727679 A discloses a package containing the food components therein and a utensil so that the food product can be eaten from within the same containment package. US 5947289 A discloses a package for a food product with a utensil attached to the container for consuming the food product. US 6776747 B2 discloses an insulated pouch containing a food product therein. US 6719140 B1 discloses a food bag with utensils for consuming the food contained within said bag attached to said bag.

9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Viren Thakur
Examiner
Art Unit: 1761

KEITH HENDRICKS
PRIMARY EXAMINER